Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Telecommunications Relay Services	)	CG Docket No. 03-123
and Speech-to-Speech Services for	)	
Individuals with Hearing and	)	
Speech Disabilities	)	
	)	
Structure and Practices of the	)	CG Docket No. 10-51
Video Relay Service Program	)	

SORENSON'S PETITION FOR A DECLARATORY RULING OR ALTERNATIVELY A RULEMAKING REGARDING CALL HANDLING OBLIGATIONS

Christopher J. Wright
John T. Nakahata
Mark D. Davis
Harris, Wiltshire & Grannis LLP
1919 M Street, NW, Suite 800
Washington, DC 20036
(202) 730-1300
mdavis@hwglaw.com

November 8, 2016

Counsel for Sorenson Communications LLC

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

The Commission's rules require Video Relay Service ("VRS") providers to handle all calls regardless of content and to maintain the confidentiality of call content.[1] Recently, however, interpreters have raised questions about whether they may be liable if the content of a call is later judged by law enforcement to be illegal, and whether they have the ability or responsibility to protect deaf users from potential scams. Because the Commission's guidance on this issue has been conflicting, Sorenson Communications, LLC ("Sorenson") files this petition for a declaratory ruling to seek clarity. The Commission should clarify that the answer to both questions is no. It is not practical for interpreters to faithfully and accurately interpret a call while simultaneously making split-second judgments about whether the call's content may violate a variety of differing, and sometimes inconsistent, state or federal laws.

As the Commission acknowledged in a 2004 rulemaking, "TRS providers have generally understood that they must relay all calls regardless of content"—even if the call is obscene, "threatens the called party," or "discusses past or future criminal content."[2] The limited guidance from the Consumer and Governmental Affairs Bureau has been consistent with this understanding. In a 2004 Public Notice, the Bureau indicated that under the current rules, a Telecommunications Relay Service ("TRS") provider may not attempt to intervene when it suspects that a caller is engaged in a criminal scam to defraud the called party. The Bureau stated that, although these calls "are illegal, and the Department of Justice and the FBI can investigate, due to the transparent nature of the CA's role in a TRS call the Communications

---

1 47 C.F.R. §§ 64.604(a)(2), (3).

2 *Telecomms. Relay Servs. and Speech-to-Speech Servs. for Individuals With Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 12,475, 12,572 ¶ 256 (2004) ("*TRS FNPRM 2004*").

Assistant ("CA") may not interfere with the conversation. The TRS statutory and regulatory scheme do not contemplate that the CA should have a law enforcement role by monitoring the conversations they are relaying."[3]

Nevertheless, the Commission's regulations could be read differently. Under 47 C.F.R. § 64.604(a)(2)(ii), VRS interpreters must relay all calls verbatim "to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes." In adopting this language, the Commission made clear that it did not expect interpreters to be held criminally liable merely for interpreting a call in the ordinary course of business and that an interpreter would need to have "actual notice of an illegal use" before he or she could be criminally liable.[4] Accordingly, Sorenson believes that this language was intended to create a narrow exception that applies only when the interpreter knew—through sources apart from the content of the call—that the call was in furtherance of a crime or actively chose to join the conspiracy by taking action (apart from interpreting the call) to further the crime. But this language could be read much more broadly to require interpreters to terminate a call when they reasonably believe, based solely on the call content, that the call is being placed to further a crime.

This lack of clarity has caused concern for some interpreters, who fear that absent a clear federal standard, Sorenson—or worse, they personally—could face liability under some state's law for interpreting a call that may ultimately facilitate a crime. Accordingly, Sorenson

---

[3] *FCC Reminds Public of Requirements Regarding Internet Relay Service and Issues Alert*, Public Notice, 19 FCC Rcd. 10,740, 10,740-41 (2004) ("Public Notice"); *see also Telecomms. Relay Servs. and Speech-to-Speech Servs. for Individuals With Hearing and Speech Disabilities*, Further Notice of Proposed Rulemaking, 21 FCC Rcd. 5478, 5480 ¶ 6 (2006) (citing Public Notice).

[4] *Telecomms. Servs. for Individuals with Hearing and Speech Disabilities*, Report and Order and Request for Comments, 6 FCC Rcd. 4657, 4660 ¶ 15 (1991) ("*TRS 1991 R&O*").

respectfully requests that the Commission clarify that, as a matter of federal law, VRS interpreters must handle all calls—even if the interpreter believes, based solely on the call content, that the behavior of one or more of the callers is unethical or may further criminal activity—and that this rule pre-empts any federal or state law that provides otherwise.

BACKGROUND

When Congress passed the Americans with Disabilities Act in 1990, it sought to ensure that deaf and hard-of-hearing Americans could use the telephone on the same terms as hearing individuals. Consistent with that goal, Congress directed the Federal Communications Commission to adopt regulations that "prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls" and that "prohibit relay operators from disclosing the content of any relayed conversation."[5] Plainly, two hearing persons using the telephone do not anticipate, in the absence of some lawful process being issued, that the telephone company is monitoring their communications for potential unlawful or unethical conduct. In 1991, the Commission implemented these directives.[6] It adopted 47 C.F.R. § 64.604(a)(2), which required that CAs "must relay all conversation verbatim" and provided that "CAs are prohibited from disclosing the content of any relayed conversation regardless of content."[7]

In the proceeding that led to these rules, the Commission specifically considered how relay operators should respond to calls that appeared to involve illegal content. In the Notice of Proposed Rulemaking that opened the proceeding, the Commission acknowledged the possibility

---

5 47 U.S.C. § 225(d)(1)(E), (F).

6 *See TRS 1991 R&O*, 6 FCC Rcd. at 4657.

7 *Id.* at 4668 (47 C.F.R. § 64.604(a)(2)).

that TRS calls could involve conversations that are "violative of state or federal law, *e.g.*, those that are obscene or involve criminal activity that the operator would wish to report to authorities"[8] and sought comment on how providers should handle such calls. It tentatively concluded, however, that "Congress has mandated that relay operators may not intentionally alter a relayed conversation, no matter what that conversation contains, or reveal its contents."[9]

In the subsequent order adopting the confidentiality rule, the Commission once again considered how relay operators should respond to calls that appear to involve illegal conduct. It stated that Congress "intended relay operators to have the same service obligations as common carriers generally" and noted that the common-carrier obligation "is not absolute and does not necessarily apply to service for an illegal purpose."[10] But the Commission also emphasized its understanding that a relay operator would not normally be criminally liable for handling a call that furthers a crime:

> As a practical matter, however, common carriers generally will not be criminally liable absent knowing involvement in unlawful transmissions. We have had occasion to address similar issues in connection with a different common carrier service. "[A]lthough telephone common carriers do not appear to enjoy absolute immunity from liability if their facilities are used for an illegal purpose, there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." Use of Common Carriers, 2 FCC Rcd at 2820. In addition, we stated that carriers must be "knowingly" involved to be criminally liable. Id. We believe that CAs, in the normal performance of their duties, would generally not be deemed to have a "high degree of involvement or actual notice of an illegal use" or be "knowingly" involved in such illegal use. We also note that, as a practical matter, the extensive record in this proceeding suggests that actual incidents raising these questions will arise rarely, if ever.[11]

---

8 *Telecomms. Servs. for Hearing-Impaired and Speech-Impaired Individuals*, Notice of Proposed Rulemaking, 5 FCC Rcd. 7187, 7190 ¶ 17 (1990).

9 *Id.*

10 *TRS 1991 R&O*, 6 FCC Rcd. at 4660 ¶ 15.

11 *Id.*

Following adoption of the rule, carriers responded by asking for a more definite statement that interpreters cannot be held criminally liable for interpreting a call in the ordinary course of business. Specifically, NYNEX—supported by USTA, Sprint, and GTE—filed a petition for reconsideration asking the Commission to codify in its rules "that CAs 'shall not be deemed' to be knowingly involved in any illegal conversations."[12] In response, the Commission reiterated that "we continue to believe a CA generally would not be deemed to be knowingly involved in illegal use. We will, however, amend the rule to reflect that there is an exception to the requirement to complete all calls where such completion would be inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes."[13] The Commission therefore amended section 64.604 to provide that interpreters must interpret all calls verbatim "to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes."[14]

The Commission appears to have adopted this language to clarify that interpreters do not have absolute immunity if they engage in conduct that goes above and beyond interpreting a call in the ordinary course of business. And the Commission explicitly reiterated its belief that an interpreter would not face liability merely for interpreting a call. However, the Commission did not explicitly state that it was pre-empting or repealing any laws that would otherwise impose liability merely for interpreting a call. As a result, some VRS interpreters have expressed concern that an overly aggressive prosecutor could attempt to hold them criminally liable for

---

[12] *Telecomms. Servs. for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 1802, 1805 ¶ 15 (1993).

[13] *Id.* ¶ 17.

[14] *Id.* ¶ 18.

interpreting calls that discuss criminal activities—essentially on a theory that the interpreter has aided or abetted the commission of a crime merely by interpreting a conversation in which one party may have perpetrated a crime.

The interpreters' concern is understandable. Unlike employees of a telephone company, VRS interpreters know the content of every call that crosses a VRS provider's network and may suspect, based on that content, that a call is unethical or even furthering a crime. Whether background federal or state criminal law would impose liability under those circumstances turns out to be surprisingly complicated. Federal law governing the standard for aiding-and-abetting liability is "generally in a state of confusion,"[15] and as Justice Alito recently acknowledged, the Supreme Court has recently declined to resolve the confusion, leaving "our case law in the same, somewhat conflicted state that previously existed."[16] Moreover, some states continue to apply an antiquated standard for aider-and-abettor liability under which a merchant can be found criminally liable for serving a customer in the ordinary course of business if the merchant knows that the customer intends to use the seller's services to commit a crime.[17] Under this standard, an

---

[15] Benton Martin and Jeremiah Newhall, *Technology and the Guilty Mind: When Do Technology Providers Become Criminal Accomplices?*, 105 J. Crim. L. & Criminology 95, 124 (Winter 2015) (citing Wayne R. LaFave, *Substantive Criminal Law* § 13.2(e) (2d ed. 2003)); *see also* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1351 (Mar. 2002) (concluding that federal aiding-and-abetting law is in "a state of chaos—a chaos to which the cases seem oblivious").

[16] *United States v. Rosemond*, 134 S. Ct. 1240, 1253 (2014) (Alito, J., dissenting in part).

[17] This permissive view of aider-and-abettor liability originated with *Backun v. United* States, a federal case that has since been rejected by the federal courts. *See Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940) ("The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun."); *United States v. Fountain*, 768 F.2d 790, 797-98 (7th Cir. 1985) (noting that some states still appear to apply the standard articulated by *Backun* but that under federal

aggressive prosecutor might argue that interpreters had the requisite knowledge to support aiding-and-abetting liability based solely on the content of conversations they are interpreting. This is because, in some states, the statutes defining knowledge could be read to include a mere belief that the conversation likely involves a crime.[18]

The legal confusion is compounded further by the fact that interpreters are not necessarily located in the same state—or even country (Sorenson has some interpreting centers in Canada)—as the calling and called parties. There is no reason in the course of an ordinary call that an interpreter needs to know where the caller is located—and with an IP-based service, as well as mobile devices, the telephone number will not be a reliable indicator of location. To have a

---

law, "it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2, the federal aider and abettor statute."). However, some states still appear to apply the standard articulated in *Backun*. *See, e.g.*, *People v. Robinson*, 715 N.W.2d 44, 53 (Mich. 2006) (permitting aider-and-abettor liability if "the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense"); *State v. Tangie*, 616 N.W.2d 564, 574 (Ia. 2000) ("When, as here, intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting if she participates with either the requisite intent, or with knowledge the principal possesses the required intent."); *State v. Brunzo*, 248 Neb. 176, 194-95 (1995) ("when a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider and abettor knew that the perpetrator of the act possessed the required intent or that the aider and abettor himself or herself possessed such."); *Wright v. State*, 402 So. 2d 493, 499 (Fla. Dist. Ct. App. 1981) ("we find the rule in Florida to be that aiders and abettors may be convicted either upon proof of their own state of mind or upon proof that they knew that the person aided had the requisite state of mind").

[18] For example, under Arizona's criminal code, a person knows of a circumstance if he "is aware or believes . . . that the circumstance exists." Ariz. Rev. Stat. Ann. § 13-105. In New Jersey, a person has knowledge if "if he is aware . . . such circumstances exist, or he is aware of a high probability of their existence." N.J. Stat. Ann. § 2C:2-2. In Ohio, "[a] person has knowledge of circumstances when the person is aware that such circumstances probably exist." Ohio Rev. Code Ann. § 2901.22. Moreover, other states have passed "criminal facilitation" statutes which provide that a person is guilty of a crime if, "believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony." N.Y. Penal Law § 115.00.

seamless, nationwide service, as a practical matter there can be only one standard that applies. Any other result would frustrate the federal objective of a nationwide, functionally equivalent and widely accessible VRS service.

ARGUMENT

THE COMMISSION SHOULD CLARIFY THAT ITS RULES PRE-EMPT ANY STATE OR FEDERAL LAW TO THE EXTENT THAT IT WOULD IMPOSE LIABILITY FOR INTERPRETING A CALL IN THE ORDINARY COURSE OF BUSINESS.

The Commission has stated that it does not intend for providers to act as censors of VRS calls[19] and that it does not contemplate that relay interpreters will be held criminally liable merely for interpreting, in the ordinary course of business, a call that appears to involve criminal conduct.[20] However, the only regulation addressing this issue creates substantial uncertainty on this issue. Because section 64.604(a)(2)(ii) requires providers to interpret calls verbatim only "to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes," an overly aggressive local prosecutor could attempt to argue that a VRS interpreter must not handle a call if that interpreter believes that it is likely, based solely on the content of the call, that the call involves criminal activity. This does not appear to be what the Commission intended. Accordingly, pursuant to section 5(d) of the Administrative Procedure Act and 47 C.F.R. § 1.2, the Commission should "issue a declaratory ruling terminating a controversy or removing uncertainty"[21] and should clarify that its rules pre-empt any state law and repeal any federal law that would lead to that result.

---

19 *TRS FNPRM 2004*, 19 FCC Rcd. at 12,572 ¶ 257 ("We stated, however, that CAs are intended to be 'transparent conduits relaying conversations without censoring or monitoring functions,' and that section 225 provides that CAs may not divulge the content of any relayed conversation.").

20 *TRS 1991 R&O*, 6 FCC Rcd. at 4660 ¶ 15.

21 47 C.F.R. 1.2(a); *see also* 5 U.S.C. § 554(e).

State laws governing common-carrier liability more generally create substantial uncertainty on this point. At common law, in cases arising in an entirely differently technological context, "[a] public utility has not only a right but a duty to refuse to render service for criminal purposes."[22] And, particularly in older cases, some prosecutors seem to have interpreted this requirement to mean that if a common carrier is aware of call content and believes that content to be illegal, it must terminate service. Because telephone companies do not typically know the content of calls they carry, this issue has arisen most frequently for common carriers such as telegraph operators, who know the content of messages being transmitted. For example, in *State v. Western Union*,[23] Western Union and the manager of one of its facilities were convicted of operating a common-law disorderly house for transmitting telegrams that contained wagers on horse races and for wiring money involved with these wagers. A prosecutor had told the branch manager that he believed the conduct was illegal, but the company had argued that as a common carrier, it was required to accept the telegrams.[24] At trial, Western Union also argued that requiring it to assess whether messages were criminal was impractical because "it could not find employees with necessary legal knowledge to apply all the laws of the State relating to criminal and unlawful activities" and because analyzing messages would slow down the transmission of messages.[25] But the New Jersey Supreme Court upheld the conviction.

---

[22] *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966, 968 (D.D.C. 1949); *accord Rubin v. Pa. Pub. Util. Comm'n*, 197 Pa. Super. 157, 162-63 (1962).

[23] 12 N.J. 468 (1953).

[24] *Id.* at 477.

[25] *Id.* at 479.

Similarly, in *Sprint Corp. v. Evans*,[26] the State of Alabama sought to prosecute Sprint for obscenity because one of its 1-800 subscribers was running a phone-sex hotline. Sprint had received consumer complaints about the hotline and had allegedly called the hotline to investigate, but it had not taken further action. Alabama argued that because Sprint had become aware of the content of the messages and had not stopped them, it was guilty of aiding and abetting the distribution of obscene materials.[27] After Sprint filed a declaratory-judgment action, a federal judge referred the case to the FCC to determine whether Sprint could be held criminally liable under federal law,[28] but the Commission does not appear to have resolved the issue, leaving substantial uncertainty on the issue.

And recent federal prosecutions outside of telecommunications have created uncertainty under federal law, as well. For example, the federal government recently entered a consent decree with UPS and indicted FedEx for carrying packages shipped by Canadian Internet

---

[26] 846 F. Supp. 1497, 1500 (M.D. Ala. 1994).

[27] *Id.* at 1502-03 (noting that "[u]nder Evans's current theory, it would be illegal for a common carrier such as Sprint knowingly to aid and abet a subscriber in its distribution of obscene materials" and quoting the following allegations from the State's brief: "Indeed, that evidence suggests that Sprint received consumer complaints that at least one of the 800 telephone numbers covered by the grand jury subpoena (and used by one of the indicted information providers) was used to transmit messages that were obscene, sexually explicit or otherwise offensive or 'adult' in content; a Sprint representative called the telephone number at issue, listened to the messages and made his own informal determination that the messages were 'dirty,' *i.e.*, of a sexually explicit or 'adult' nature; and that the information provider continued to use Sprint services to transmit such messages....").

[28] *Id.* at 1504 (question (d)); *id.* at 1509 ("The court, therefore, will refer issues 'a' through 'e' to the FCC and direct Evans to file a petition for declaratory relief for a determination of these issues by the FCC.").

pharmacies.[29] The government's theory appears to have been that FedEx and UPS—both of whom are common carriers—knew that the packages they were carrying contained prescription drugs shipped without a prescription.

Of course, none of these other cases involved a service in which Congress had mandated that the service be provided in a manner functionally equivalent to hearing-to-hearing telephone service. Certainly a telegraph is not functionally equivalent to hearing telephone service, and neither is shipment of packages by UPS and FedEx. And while the Sprint case involved hearing telephone service, its facts are *sui generis* and certainly not comparable to the role of video interpreters. Whether those cases were right or wrong, the mandate of functional equivalence requires a clearer and different, uniform national scheme.

The lack of clarity in both the common law and the Commission's ambiguous rulings has put VRS providers and their interpreters in an unfair bind. On the one hand, based on conversations with the Consumer and Governmental Affairs Bureau, Sorenson believes that it may face FCC enforcement action if it terminates calls. On the other hand, some of Sorenson's interpreters have expressed fear that they could be criminally prosecuted if calls they handle turn out to be furthering a crime. These fears complicate that already-difficult job of an interpreter, and unaddressed will make it difficult for VRS provider to recruit and retain badly needed interpreters.

Accordingly, the Commission should clarify that VRS interpreters are required to interpret *all* calls—even calls that they believe may include unethical behavior by either party, or

---

[29] *See* Press Release, Dep't of Justice, UPS Agrees to Forfeit $40 Million In Payments From Illicit Online Pharmacies For Shipping Services (Mar. 29, 2013), https://www.justice.gov/usao-ndca/pr/ups-agrees-forfeit-40-million-payments-illicit-online-pharmacies-shipping-services; Superseding Indictment, United States v. FedEx Corp., No. 3:14-cr-00380-CRB (N.D. Cal. Aug. 14, 2014).

in the more extreme, facilitate criminal activity. The alternative—requiring interpreters to monitor call content and terminate calls that appear to be unethical or illegal—violates the principles of functional equivalency, would be impossible to administer, and interferes with the important principle of confidentiality. Absent a court order or some other legal process, hearing callers ordinarily do not have their calls monitored by government-appointed third parties to determine whether the conversation is illegal. Further, hearing callers do not have third parties making judgments as to whether one party may be taking unfair advantage of another. Most importantly, VRS interpreters generally lack the legal training to determine whether call content is consistent with the law of a particular combination of jurisdictions, including where the calling and called parties are located, and where the interpreter is located. Indeed, VRS interpreters generally do not even know the locations of the callers for whom they interpret.

Moreover, Sorenson operates more than 100 call centers in 43 states of the United States, 5 provinces in Canada, and Puerto Rico. Calls are distributed automatically to these call centers in compliance with the Commission's rules requiring generally that they be answered in the order received—which means that calls are essentially randomly distributed. In such an FCC-mandated system, it is literally impossible to construct a compliance system to match all the possible combinations of laws of 50 states, the District of Columbia and Puerto Rico, plus federal law, and forcing providers to do so would threaten the very existence of VRS (or indeed, any form of TRS). Accordingly, attempting to enforce compliance with all state laws would frustrate the core purpose of section 225—to make available a nationwide, functionally equivalent TRS service.

Perhaps most importantly, any exception to the rule of strict confidentiality of VRS calls would cause callers to fear that their calls were being broadly monitored. Deaf and speech-

impaired individuals cannot, consistent with functional equivalence and the core purposes of the Americans with Disabilities Act, be subject to a lower expectation of privacy than hearing users of the ordinary telephone system. Any legal regime that leads deaf and hearing-impaired consumers to believe they have less privacy than hearing users of the telephone network violates functional equivalence.

CONCLUSION

The Commission should clarify that its rules preempt state or federal law to the extent that it would impose liability for interpreting a call in the normal course of business.

Respectfully submitted,

/s/ Mark D. Davis

Christopher J. Wright
John T. Nakahata
Mark D. Davis
Harris, Wiltshire & Grannis LLP
1919 M Street, NW, Suite 800
Washington, DC 20036
(202) 730-1300
mdavis@hwglaw.com

Dated: November 8, 2016

Counsel for Sorenson Communications LLC